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**SOAH DOCKET NO. 473-22-04394
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APPLICATION OF ENTERGY TEXAS, INC. FOR AUTHORITY TO CHANGE RATES	§ § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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COMMISSION STAFF'S REPLY BRIEF ON ISSUES 68 AND 69

Dated: January 27, 2023

Respectfully submitted,

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TABLE OF ABBREVIATIONS

AACE	Americans for Affordable Clean Energy
ChargePoint	ChargePoint, Inc.
Commission	Public Utility Commission of Texas
ETI	Entergy Texas, Inc.
FlashParking	FlashParking, Inc.
OPUC	Office of Public Utility Counsel
PURA	Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001–66.016
SPS	Southwestern Public Service Company
Staff	Commission Staff
TAC	Texas Administrative Code
TECDA	Transportation Electrification and Charging Demand Adjustment
TECI	Transportation Electrification and Charging Infrastructure
TxDOT	Texas Department of Transportation

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COMMISSION STAFF’S REPLY BRIEF ON ISSUES 68 AND 69

I. INTRODUCTION

Staff reiterates its position that the Commission should determine that it is not appropriate for ETI and similarly situated vertically integrated utilities to own vehicle-charging facilities or other transportation electrification and charging infrastructure at this time. First, one of the underlying fundamentals of PURA § 11.002 and 16 TAC § 25.1, is that regulated utilities, such as ETI, are authorized to operate as monopolies in specific areas to the extent that reasonable and adequate service cannot be provided by the competitive market. The record and briefing on this issue does not adequately demonstrate that Texas, and more relevantly ETI’s service territory, cannot receive reasonable and adequate service of transportation electrification and charging infrastructure without ETI or other vertically integrated utilities participating in the market. As such, allowing ETI to join the competitive market at this time would contravene PURA § 11.002 and 16 TAC § 25.1. Furthermore, there is also potential for the competitive market to be hindered by participation from ETI.

However, if the Commission determines that it is appropriate for ETI and other vertically integrated utilities to own vehicle-charging facilities or other transportation electrification and charging infrastructure, Staff reiterates its position that ETI should not be allowed to do so in the manner it has proposed in its application through the TECI-1 Rider. Specifically, ETI’s proposed TECI-1 Rider is unreasonably preferential and discriminatory, is inequitable, and should be rejected as it is not just and reasonable. Separately, ETI’s proposed TECDA-1 Rider is also unreasonably preferential and discriminatory, is inequitable, and grants an unreasonable preference concerning rates to certain persons in a classification, and should be rejected as it is not just and reasonable.

II. PRELIMINARY ORDER ISSUE NO. 68. IS IT APPROPRIATE FOR AN ELECTRIC UTILITY IN A VERTICALLY INTEGRATED AREA TO OWN VEHICLE-CHARGING FACILITIES OR OTHER TRANSPORTATION ELECTRIFICATION AND CHARGING INFRASTRUCTURE, OR SHOULD THE OWNERSHIP OF SUCH FACILITIES BE LEFT TO COMPETITIVE PROVIDERS?

No. Staff reiterates that it is not appropriate for an electric utility in a vertically integrated area to own vehicle-charging facilities or other transportation electrification and charging infrastructure and such ownership should be left to competitive providers such as potential customers and third parties that will allow the competitive market to continue its development throughout Texas. Staff, however, qualifies its position that it is not appropriate *at this time*. As discussed in Staff's initial brief, the underlying principles of PURA § 11.002 and 16 TAC § 25.1 provide the Commission with a guidance and purpose to ensure that competition is facilitated.¹ In Staff's view would allow ETI to inappropriately provide a competitive service.² The basis of Staff's position is that the evidence and briefing submitted on this issue does not sufficiently demonstrate that ETI's service territory cannot receive reasonable and adequate service of transportation electrification and charging infrastructure without ETI participating in the market. To support that basis, Staff highlights that ETI plans to rely on third parties to install and maintain the transportation electrification infrastructure, indicating that such third parties may have the capability to provide reasonable and adequate service without ETI's ownership of such infrastructure,³ and that the competitive market can develop the market further to meet demand and be able to provide reasonable and adequate service though the availability of government funding and resources.⁴

One such resource is the Texas Electric Vehicle Infrastructure Plan, which will be implemented through a competitive bidding processes with the private sector.⁵ While ETI and SPS argue that this plan, among other reasons, indicate that Texas has a stated policy of supporting the expansion of transportation electrification and charging infrastructure, and thus support the need

¹ Commission Staff's Initial Brief on Issues 68 and 69 at 2-3 (Jan. 13, 2023) (Staff's Initial Brief).

² *Id.* at 3.

³ *Id.*

⁴ *Id.* at 3-4 (referring to the VW-EPA "dieselgate" settlement, the Inflation Reduction Act, the Texas Emissions Reduction Plan, and most importantly, the Texas Electric Vehicle Infrastructure Plan).

⁵ *Id.* at 4.

for ETI and other vertically integrated utilities to enter that market,⁶ both do not consider that TxDOT, in developing the plan, intentionally contemplated that the private sector entities, through which implementation of the plan will occur, should not necessarily include electric utilities.⁷ Furthermore, while ETI argues that the plan prioritizes development along interstate corridors over areas that would include its service territory,⁸ SPS notes that the plan intends for there to be charging facilities in every county within Texas within 5 years.⁹ As noted in Staff's initial brief, it is premature to assume that implementation of the plan requires participation by ETI or other vertically integrated utilities in order for TxDOT to ensure that reasonable and adequate service can be provided by the otherwise competitive market within this 5 year timeframe.¹⁰ SPS attempts to compare the competitive market for developing transportation electrification and charging infrastructure is similar to the market for developing high speed/broadband infrastructure to argue that the market will not move into more rural and low-income areas.¹¹ SPS also states, without evidence, that there are likely only a limited number cases where a competitive market participant on its own would choose to invest in such areas.¹² SPS, however, does not consider the implications of the Texas Electric Vehicle Infrastructure Plan and other resources available to the competitive market that will allow the competitive market participants to provide reasonable and adequate service without ETI or other vertically integrated utilities participating in that market. Furthermore, Staff reaffirms that the Commission should not equate the trends of the market for high speed/broadband infrastructure and the responsive policy decisions to make a comparison with the market transportation electrification and charging infrastructure and make policy decisions based on the alleged comparisons.¹³

⁶ Entergy Texas, Inc.'s Initial Brief Addressing Preliminary Order Issue Nos. 68 and 69 at 9-10 (Jan. 13, 2023) (ETI's Initial Brief) and Southwestern Public Service Company's Initial Brief Regarding Preliminary Order Issue Nos. 68 and 69 at 5-7 (Jan. 13, 2023) (SPS's Initial Brief).

⁷ Staff's Initial Brief at 4.

⁸ ETI's Initial Brief at 10-11.

⁹ SPS's Initial Brief at 6.

¹⁰ Staff's Initial Brief at 4.

¹¹ SPS's Initial Brief at 11-12.

¹² *Id.* at 12-13.

¹³ Staff's Initial Brief at 5.

As far as comparisons, ETI refers to the market for generation and seems to argue that the Legislature would not intend to treat the market for generation differently from the market for transportation electrification and charging infrastructure.¹⁴ And because the Legislature intends for ETI and other vertically integrated utilities to be able to continue providing fully-bundled electric service, including generation services, ETI argues it would be inconsistent with that intention by prohibiting ETI from participating in a completely separate competitive market.¹⁵ However, because this is a completely separate market that is developing in a different manner than the market for generation within Texas, ETI's attempted comparison should not be given weight.¹⁶ ETI also notes that PURA § 31.002(6)(J)(iv), exempts competitive providers of electric vehicle charging services from becoming electric utilities under PURA, but argues that the Legislature did not thereby remove ETI's traditional rights to provide electric delivery services, including the provision of transportation electrification and charging infrastructure services.¹⁷ ETI, however, fails to consider that the Legislature intended PURA § 31.002(6)(J)(iv) to provide the competitive providers with regulatory clarity to help facilitate deployment and competition of electric vehicle charging stations for customers, while the competitive market further develops.¹⁸

ETI and SPS both argue that vertically integrated utilities are well positioned to help the market further develop.¹⁹ However, as noted in Staff's initial brief, neither consider the alternative that allowing ETI and other vertically integrated utilities to join the market might hinder competition, by deterring smaller competitive providers from entering the market or maintaining a presence in the market, and that proposals like ETI's TECI-1 Rider, with a potentially limited list of vendors selected and favored by ETI, would directly contribute to that hindrance and make the market less competitive.²⁰ ETI also states that utility ownership is accepted at the federal level and within other states to argue that the Commission should be consistent with other jurisdictions.²¹

¹⁴ ETI's Initial Brief at 14.

¹⁵ *Id.*

¹⁶ Staff Initial Brief at 5.

¹⁷ *Id.*

¹⁸ *Id.* at 6.

¹⁹ ETI's Initial Brief at 11-13 and SPS's Initial Brief at 9-16.

²⁰ Staff's Initial Brief at 4-5.

²¹ ETI's Initial Brief at 14-15.

However, the Commission should only consider the market within in its own jurisdiction to determine whether the competitive market within Texas, or for this proceeding, within ETI's service territory, can provide reasonable and adequate service. And in Staff's view, there is not sufficient evidence to demonstrate that the competitive market cannot provide such reasonable and adequate service moving forward as demand increases or at least that it is premature to assume that the competitive market cannot further develop to match demand.

As far as the other parties in this proceeding, FlashParking and ChargePoint both recommend that it is appropriate for vertically integrated utilities to own transportation electrification and charging infrastructure.²² FlashParking, however, in context of ETI's proposed TECI-1 Rider, recommends that the Commission order ETI to broaden its list of pre-qualified vendors to include all electric vehicle service providers, or to at least inform customers about other competitive providers and eliminate the requirement that only allows customers to select from ETI's list of vendors.²³ This coincides with Staff's concerns that a program such as that proposed by ETI might actually stifle competition for EV charging station deployment by favoring some providers over others. ChargePoint, however, in contrast with FlashParking's recommended modifications, supports ETI's proposed TECI-1 Rider, because it allows customers to choose their preferred electric vehicle charging equipment and network service provider and set the prices charged to electric vehicle drivers—implying that sufficient customer choice is already available, as numerous providers have already indicated willingness to operate in ETI's territory.²⁴ Additionally, ChargePoint explicitly disregards its own concerns that ETI's participation in the market will create competition concerns.²⁵

Presumably to soften those concerns, ChargePoint distinguishes between ownership of make-ready infrastructure and ownership of electric vehicle charging stations to argue that make-ready infrastructure ownership by utilities will help the competitive market for charging stations

²² FlashParking, Inc.'s Initial Brief -- Relating Only to the EV Charging Infrastructure Issues at 4-7 (Jan. 13, 2023) (FlashParking's Initial Brief) and ChargePoint, Inc.'s Initial Brief at 3-8 (Jan. 13, 2023) (ChargePoint's Initial Brief).

²³ FlashParking's Initial Brief at 9; *Contrast with* SPS's Initial Brief at 16-17, in which SPS argues that limited customer choice is appropriate.

²⁴ ChargePoint's Initial Brief at 10-11; *Contrast with* SPS's Initial Brief at 16-17, in which SPS argues that limited customer choice is appropriate.

²⁵ *Id.* at 9-10.

develop.²⁶ AACE makes this same distinction and argument as well.²⁷ However, as detailed previously in response to ETI and SPS, ChargePoint and AACE similarly do not consider the implications of the Texas Electric Vehicle Infrastructure Plan and other resources available to the competitive market for make-ready infrastructure that will allow the competitive market participants to provide reasonable and adequate service without ETI or other vertically integrated utilities participating in that market. ChargePoint departs from AACE's position regarding ownership of charging stations, because, as detailed above, it supports ETI's proposed TECI-1 Rider.²⁸ AACE, however, does not support ETI's proposed TECI-1 Rider, because it would give ETI the opportunity to own all or portions of customer charging stations, allowing ETI to compete in the electric vehicle competitive market.²⁹

These differences between the parties provide the Commission with examples of disagreement among those participating in this general market for transportation electrification and charging infrastructure, such that further disagreement is likely to exist and be amplified outside the context of this proceeding.³⁰ While Staff defers to the Commission's decision to include and litigate these issues in this rate case, it may be beneficial and possibly more appropriate to consider these complex issues outside the confines of this rate case.³¹ Notably, OPUC indicates such a decision to consider these issues in a separate docket, such as a rulemaking, may enable greater participatory engagement from all four vertically-integrated, non-ERCOT investor-owned electric utilities,³² and presumably more competitive providers from the market for transportation electrification and charging infrastructure.

²⁶ *Id.* at 4-6.

²⁷ Americans for Affordable Clean Energy's Initial Brief at 2-3 (Jan. 13, 2023) (AACE's Initial Brief).

²⁸ ChargePoint's Initial Brief at 10-11.

²⁹ AACE's Initial Brief at 3-6.

³⁰ Staff's Initial Brief at 7; *Contrast with* ETI's Initial Brief at 15, in which ETI seems to argue that ChargePoint's and FlashParking's involvement in this proceeding and general support of ETI's TECI-1 and TECDA-1 Riders demonstrates that ETI's proposals benefit the competitive market generally and at large. The general support by two competitive providers should not be representative of the entire competitive market though, especially when such support is qualified.

³¹ Open Meeting Tr. at 64-65 (Oct. 6, 2022); see also October 6, 2022 Open Meeting Discussion of Item No. 22 at 56:11 - 57:17 (https://adminmonitor.com/tx/puct/open_meeting/20221006/, last visited Jan. 27, 2023).

³² Office of Public Utility Counsel's Post-Hearing Initial Brief on Preliminary Order Issues Nos. 68 and 69 at 6-7 (Jan. 13, 2023) (OPUC's Initial Brief).

III. PRELIMINARY ORDER ISSUE NO. 69. SHOULD ENTERGY BE ALLOWED TO OWN TRANSPORTATION ELECTRIFICATION AND CHARGING INFRASTRUCTURE—INCLUDING VEHICLE-CHARGING FACILITIES—IN THE MANNER IT HAS PROPOSED IN ITS APPLICATION, OR SHOULD SUCH OWNERSHIP BE WHOLLY LEFT TO CUSTOMERS OR THIRD PARTIES?

No. Staff reiterates that ETI's proposed TECI-1 Rider should be rejected because it would allow ETI to inappropriately provide a competitive service, as detailed above, and it is unreasonably preferential and discriminatory, is inequitable, and is not just and reasonable. Separately, ETI's proposed TECDA-1 Rider should similarly be rejected because it is also unreasonably preferential and discriminatory, is inequitable, and grants an unreasonable preference concerning rates to certain persons in a classification, and is not just and reasonable.

A. TRANSPORTATION ELECTRIFICATION AND CHARGING INFRASTRUCTURE ("TECI") RIDER

Aside from the ownership and competitive related arguments discussed in Section II above, ETI's proposed TECI-1 Rider should be rejected for other reasons. As indicated in Staff's initial brief, one such reason is that the rider relies on non-standard pricing that is tailored to individual customers and is dependent on customer-specific details unavailable at this time, such that the Commission cannot sufficiently analyze relevant infrastructure costs and rider revenues to make an appropriate and required review.³³ ETI argues that its proposed TECI-1 Rider is functionally equivalent to its Commission-approved Additional Facilities Charge Rider, Option B and its Commission-approved Area Lighting Service Rider,³⁴ but does not necessarily address Staff's concerns with being unable to sufficiently evaluate for potential undue cross-subsidization or other form of discriminatory or preferential treatment.³⁵ Thus, there is a risk to other customers if costs and revenues associated with the TECI-1 Rider do not match up.³⁶ While ETI argues that it has safeguards in place to ensure that the TECI-1 Rider only recovers its costs from participating customers,³⁷ it does not address whether it has any safeguards in the event that infrastructure costs

³³ Staff's Initial Brief at 9.

³⁴ ETI's Initial Brief at 16-17.

³⁵ Staff's Initial Brief at 9.

³⁶ *Id.* at 9.

³⁷ ETI's Initial Brief at 17-21.

and rider revenues do not match. Furthermore, despite the noted safeguards, there is always potential for certain costs to become uncollectible expenses that will be borne by non-participating customers.³⁸ ETI and SPS argue that the Commission considers uncollectible expenses as part of conducting business for an electric utility.³⁹ However, Staff reaffirms that requiring non-participating customer classes to bear some of the uncollectible expenses could be considered as a discriminatory practice against those non-participating customer classes.⁴⁰ Thus, if the Commission approves the TECI-1 Rider, it should be necessary to protect the non-participating classes from bearing any of the costs associated with the rider, including through the methods recommended by OPUC,⁴¹ to the extent such methods prevent the TECI-1 Rider from remaining unreasonably preferential and discriminatory. Furthermore, the rider should also be adjusted to use ETI's pre-tax weighted-average cost of capital approved by the Commission in this proceeding.⁴²

B. TRANSPORTATION ELECTRIFICATION AND CHARGING DEMAND ADJUSTMENT ("TECDA") RIDER

Staff reiterates that ETI's analysis to develop its proposed TECDA-1 Rider was unreasonable, in error, and should not be considered to support ETI's proposed TECDA-1 Rider.⁴³ Staff also reiterates that the TECDA-1 Rider will impact non-participating customers, by allowing qualifying participating customers to pay only a portion of their capacity costs which they cause ETI to incur and thus unreasonably discriminating against a non-participating customer with identical usage and load, who would potentially end up paying much more than the participating customers.⁴⁴ ETI focuses on the alleged net benefits that non-participating customers may experience,⁴⁵ but disregards that the non-participating customers would bear costs that they otherwise would not have borne, thus highlighting the fact that the TECDA-1 Rider can result in

³⁸ Staff's Initial Brief at 9-10.

³⁹ ETI's Initial Brief at 18 and SPS's Initial Brief at 18.

⁴⁰ Staff's Initial Brief at 9-10.

⁴¹ OPUC's Initial Brief at 4-5.

⁴² Staff's Initial Brief at 10.

⁴³ *Id.*

⁴⁴ *Id.* at 11.

⁴⁵ ETI's Initial Brief at 24-26.

discriminatory practices by ETI, which ETI essentially acknowledges can occur.⁴⁶ ETI also attempts to compare the TECDA-1 Rider with others that have been approved by the Commission and allow for differing billing treatment for certain types of customers from other customers on the same rate schedules.⁴⁷ While Staff disagrees that those comparisons are applicable to these circumstances, Staff reiterates that the Commission should instead be guided by Commission precedent in Docket No. 22344 to determine that the TECDA-1 Rider is unduly preferential and discriminatory because it includes a demand adjustment and results in participating customers being billed for facility/distribution charges based on monthly kWh energy usage and not NCP demand.⁴⁸

Lastly, as noted by OPUC, the proposed billing demand adjustment would be a discounted rate under PURA § 36.007(a), such that any under-recovered demand revenues should not be borne by non-participating customers.⁴⁹

IV. CONCLUSION

As stated in the initial brief, Staff respectfully requests the entry of a proposal for decision consistent with the foregoing discussion, finding that it is not appropriate for an electric utility in a vertically integrated area to own vehicle-charging facilities or other transportation electrification and charging infrastructure at this time, that ETI should not be allowed to own transportation electrification and charging infrastructure-including vehicle-charging facilities-in the manner it has proposed in its application, and that the TECI-1 and TECDA-1 riders should be rejected.

⁴⁶ Staff's Initial Brief at 11-12.

⁴⁷ ETI's Initial Brief at 26-27.

⁴⁸ Staff's Initial Brief at 12.

⁴⁹ OPUC's Initial Brief at

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CERTIFICATE OF SERVICE

I certify that unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on January 27, 2023 in accordance with the Second Order Suspending Rules, issued in Project No. 50664.

/s/ Scott Miles
Scott Miles